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APPLICATION NO.	FILING DATE	FIRST NAMED INVENTOR	ATTORNEY DOCKET NO.	CONFIRMATION NO.
10/633,738	08/04/2003	Graham John Myatt	9151R	5595

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THE PROCTER & GAMBLE COMPANY
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EXAMINER

WHITE, EVERETT NMN

ART UNIT	PAPER NUMBER
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1623

DATE MAILED: 02/23/2005

Please find below and/or attached an Office communication concerning this application or proceeding.

**Advisory Action
Before the Filing of an Appeal Brief**

Application No.

10/633,738

Applicant(s)

MYATT ET AL.

Examiner

EVERETT WHITE

Art Unit

1623

--The MAILING DATE of this communication appears on the cover sheet with the correspondence address --

THE REPLY FILED 10 February 2005 FAILS TO PLACE THIS APPLICATION IN CONDITION FOR ALLOWANCE.

1. ☒ The reply was filed after a final rejection, but prior to filing a Notice of Appeal. To avoid abandonment of this application, applicant must timely file one of the following replies: (1) an amendment, affidavit, or other evidence, which places the application in condition for allowance; (2) a Notice of Appeal (with appeal fee) in compliance with 37 CFR 41.31; or (3) a Request for Continued Examination (RCE) in compliance with 37 CFR 1.114. The reply must be filed within one of the following time periods:

- a) ☐ The period for reply expires _____ months from the mailing date of the final rejection.
b) ☒ The period for reply expires on: (1) the mailing date of this Advisory Action, or (2) the date set forth in the final rejection, whichever is later. In no event, however, will the statutory period for reply expire later than SIX MONTHS from the mailing date of the final rejection.

Examiner Note: If box 1 is checked, check either box (a) or (b). ONLY CHECK BOX (b) WHEN THE FIRST REPLY WAS FILED WITHIN TWO MONTHS OF THE FINAL REJECTION. See MPEP 706.07(f).

Extensions of time may be obtained under 37 CFR 1.136(a). The date on which the petition under 37 CFR 1.136(a) and the appropriate extension fee have been filed is the date for purposes of determining the period of extension and the corresponding amount of the fee. The appropriate extension fee under 37 CFR 1.17(a) is calculated from: (1) the expiration date of the shortened statutory period for reply originally set in the final Office action; or (2) a set forth in (b) above, if checked. Any reply received by the Office later than three months after the mailing date of the final rejection, even if timely filed may reduce any earned patent term adjustment. See 37 CFR 1.704(b).

NOTICE OF APPEAL

2. ☐ The reply was filed after the date of filing a Notice of Appeal, but prior to the date of filing an appeal brief. The Notice of Appeal was filed on _____. A brief in compliance with 37 CFR 41.37 must be filed within two months of the date of filing the Notice of Appeal (37 CFR 41.37(a)), or any extension thereof (37 CFR 41.37(e)), to avoid dismissal of the appeal. Since a Notice of Appeal has been filed, any reply must be filed within the time period set forth in 37 CFR 41.37(a).

AMENDMENTS

3. ☐ The proposed amendment(s) filed after a final rejection, but prior to the date of filing a brief, will not be entered because
(a) ☐ They raise new issues that would require further consideration and/or search (see NOTE below);
(b) ☐ They raise the issue of new matter (see NOTE below);
(c) ☐ They are not deemed to place the application in better form for appeal by materially reducing or simplifying the issues for appeal; and/or
(d) ☐ They present additional claims without canceling a corresponding number of finally rejected claims.

NOTE: _____. (See 37 CFR 1.116 and 41.33(a)).

4. ☐ The amendments are not in compliance with 37 CFR 1.121. See attached Notice of Non-Compliant Amendment (PTOL-324).
5. ☐ Applicant's reply has overcome the following rejection(s): _____.
6. ☐ Newly proposed or amended claim(s) _____ would be allowable if submitted in a separate, timely filed amendment canceling the non-allowable claim(s).
7. ☒ For purposes of appeal, the proposed amendment(s): a) ☐ will not be entered, or b) ☒ will be entered and an explanation of how the new or amended claims would be rejected is provided below or appended.
The status of the claim(s) is (or will be) as follows:
Claim(s) allowed: _____.
Claim(s) objected to: _____.
Claim(s) rejected: 1-32.
Claim(s) withdrawn from consideration: _____.

AFFIDAVIT OR OTHER EVIDENCE

8. ☐ The affidavit or other evidence filed after a final action, but before or on the date of filing a Notice of Appeal will not be entered because applicant failed to provide a showing of good and sufficient reasons why the affidavit or other evidence is necessary and was not earlier presented. See 37 CFR 1.116(e).
9. ☐ The affidavit or other evidence filed after the date of filing a Notice of Appeal, but prior to the date of filing a brief, will not be entered because the affidavit or other evidence failed to overcome all rejections under appeal and/or appellant fails to provide a showing of good and sufficient reasons why it is necessary and was not earlier presented. See 37 CFR 41.33(d)(1).
10. ☐ The affidavit or other evidence is entered. An explanation of the status of the claims after entry is below or attached.

REQUEST FOR RECONSIDERATION/OTHER

11. ☒ The request for reconsideration has been considered but does NOT place the application in condition for allowance because: of the reasons set forth in the previously filed Office Actions. See response to arguments on the continuation sheet.
12. ☒ Note the attached Information Disclosure Statement(s). (PTO/SB/08 or PTO-1449) Paper No(s). Dec. 1, 2004
13. ☐ Other: _____.

Claim Rejections - 35 USC § 103

1. Claims 1-27 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Nakamura et al (US Patent No. 6,045,847) in view of Marlett et al (US Patent No. 6,287,609) or Colliopoulos (US Patent No. 5,009,916) for the reasons set forth on pages 2-5 of the Office Action mailed March 23, 2004.

2. Applicant's arguments filed February 10, 2005 have been fully considered but they are not persuasive. Applicants argue against the rejection on the ground that the Nakamura et al, Marlett et al and Colliopoulos patents do not teach or suggest all of the claimed limitations of Claims 1-32 and, therefore, do not establish a prima facie case of obviousness. More specifically, Applicants argue that at least one of the cited references fail to teach or suggest a polysaccharide component comprising xylose and arabinose, where the ratio of the xylose to the arabinose is at least about 3:1, by weight, in combination with a dispersing component. In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). The Marlett et al patent established that a composition comprising the ratio of xylose to arabinose at 3:1 is well known in the art. The Nakamura et al patent shows that compositions comprising xylose and arabinose along with other additives that fall within the scope of the claimed dispersing component is known in the art. The Colliopoulos patent is cited to show that compositions comprising agglomerates along with xylose and arabinose is known in the art. Applicants further argue that the combination of the Nakamura et al, Marlett et al and Colliopoulos patents lacks motivation to reject the instantly claimed invention. This argument is not persuasive because the examiner recognizes that obviousness can only be established by combining or modifying the teachings of the prior art to produce the claimed invention where there is some teaching, suggestion, or motivation to do so found either in the references themselves or in the knowledge generally available to one of ordinary skill in the art. See *In re Fine*, 837 F.2d 1071, 5 USPQ2d 1596 (Fed. Cir. 1988) and *In re Jones*, 958 F.2d 347, 21 USPQ2d 1941 (Fed. Cir. 1992). In this case,

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one of ordinary skill in this art would be motivated to combine the teachings of the Nakamura et al, Marlett et al and Colliopoulos patents in a rejection of the claims under 35 U.S.C. 103 since all the patents set forth dietary compositions that comprise xylose and arabinose. Accordingly, the rejection of Claims 1-27 under 35 U.S.C. 103(a) as being unpatentable over the Nakamura et al patent in view of the Marlett et al patent or Colliopoulos patent is maintained for the reasons of record.

3. Claims 11 and 14 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Nakamura et al and Marlett et al as applied to Claims 1-27 above, and further in view of Barbera (US Patent No. 5,425,945) for the reasons disclosed on pages 5 and 6 of the Office Action mailed March 23, 2004.

4. Applicant's arguments filed February 10, 2005 have been fully considered but they are not persuasive. Applicants argue that at least one of the cited references fail to teach or suggest a polysaccharide component comprising xylose and arabinose, where the ratio of the xylose to the arabinose is at least about 3:1, by weight, in combination with a dispersing component. In response to applicant's arguments against the references individually, one cannot show nonobviousness by attacking references individually where the rejections are based on combinations of references. See *In re Keller*, 642 F.2d 413, 208 USPQ 871 (CCPA 1981); *In re Merck & Co.*, 800 F.2d 1091, 231 USPQ 375 (Fed. Cir. 1986). The Marlett et al patent established that a composition comprising the ratio of xylose to arabinose at 3:1 is well known in the art. The Nakamura et al patent shows that compositions comprising xylose and arabinose alone with other additives that fall within the scope of the claimed dispersing component is known in the art. The Barbera patent was cited to show that composition, which comprises agglomerated psyllium husk containing edible acid is known in the art. The Barbera patent discloses that the edible acids include citric acid, ascorbic acid, malic acid, succinic acid, tartaric acid and phosphoric acid (see column 4, 4th paragraph) which include some of the edible acids set forth in the instantly claimed invention. The Barbera patent also set forth the use of maltodextrin as the agglomerating material (see column 6, line 13). Accordingly, the rejection of Claims 11 and 14 under 35 U.S.C.


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103(a) as being unpatentable over the Nakamura et al and Marlett et al patents as applied to Claims 1-27 above, and further in view of Barbera patent is maintained for the reasons of record.

5. Claims 1 and 28-32 stand rejected under 35 U.S.C. 103(a) as being unpatentable over Colliopoulos (US Patent No. 5,009,916) in view of Marlett et al (US Patent No. 6,287,609) for the reasons disclosed on pages 6-8 of the Office action mailed March 23, 2004.

Applicant's arguments filed February 10, 2005 have been fully considered but they are not persuasive. Applicants argue that the references fail to teach or suggest a polysaccharide component comprising xylose and arabinose, where the ratio of the xylose to the arabinose is at least about 3:1, by weight, in combination with a dispersing component. This argument is not persuasive since the Marlett et al patent established that a composition comprising the ratio of xylose to arabinose at 3:1 is well known in the art. In response to applicant's argument that the references fail to show a certain feature of applicant's invention, it is noted that the feature upon which applicant relies (i.e., use of an agglomerate that comprises from about 10% to about 90% of a polysaccharide component that are fractioned off of the psyllium seed husk) is not recited in the rejected claim(s). Although the claims are interpreted in light of the specification, limitations from the specification are not read into the claims. See *In re Van Geuns*, 988 F.2d 1181, 26 USPQ2d 1057 (Fed. Cir. 1993). Accordingly, the rejection of Claims 1 and 28-32 under 35 U.S.C. 103(a) as being unpatentable over the Colliopoulos patent in view of the Marlett et al patent is maintained for the reasons of record.


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